WONG CHEONG KAI & ORS.

v.

HONGKONG & SHANGHAI BANK & ANOR.

HIGH COURT MALAYA, IPOH
TUAN KANG HWEE GEE J
[CIVIL SUIT NO: 22-58-1992]
13 APRIL 1996

CIVIL PROCEDURE: *Striking out - O. 18 r. 19 RHC - - Auction of land pursuant to order for sale - Purported breach of conditions of sale by 1st defendant's solicitors - Plaintiffs claiming financial loss - Whether certificate of sale conclusive that sale properly carried out - Whether 2nd defendant as solicitors and officers of the Court under s 14(2) of Courts of Judicature Act 1964 immune from liability - Failure to join all co-proprietors of land as plaintiffs - Whether present plaintiffs have locus standi to maintain action - O. 15 rr. 4(2) & (6(1) RHC - Whether plaintiffs' statement of claim discloses reasonable cause of action.*

This was an appeal by the plaintiffs against the decision of the Deputy Registrar allowing the defendant's application to strike out the plaintiffs' statement of claim under O. 18 r. 19 of the Rules of the High Court 1980 ('RHC').

The plaintiffs were the registered co-proprietors of three pieces of land which were charged to the 1st defendant bank to secure an overdraft facility for a third party. Subsequently, foreclosure proceedings were commenced by the 2nd defendant as solicitors of the 1st defendant to recover the sum due on the charge and on 24 July 1987, an order for sale was granted by the High Court. The reserve price of RM1,020,000 was fixed by the Court and the property was sold at that price on 25 March 1989 by public auction. In their statement of claim, the plaintiffs claimed that the 2nd defendant, who conducted the sale, had breached the conditions of sale by *inter alia* collecting the 10% deposit on 28 March 1989 and not on the fall of the hammer, had allowed the purchasers two extensions of time to pay the balance purchase price without the consent of the plaintiffs and had transferred the property to the purchaser while the balance purchase price was still outstanding. As a result, the plaintiffs claimed they suffered financial loss.

The defendants submitted that as the certificate of sale, Form 16F, had been issued to the purchaser, it was conclusive until the sale was set aside, that the sale had been properly carried out. They also submitted that as they were acting as solicitors of the 1st defendant and were officers of the Court together with the bailiff and the auctioneer in the conduct of the sale, they were immune from liablility under s. 14(2) of the Courts of Judicature Act 1964. Further, the defendants argued that the plaintiffs' failure to join the 9th co-proprietor

as a plaintiff to this action contrary to O. 15 r. 4(2) of the RHC, meant that the remaining plaintiffs did not have the *locus standi* to proceed with the action. Thus, the defendant averred that the plaintiffs' statement of claim ought to be struck out as it disclosed no reasonable cause of action.

Held:

[1] It is clear that a Form 16F certificate issued under s. 259(3)(a) of the National Land Code 1965 ('NLC') by its very content says no more than the fact that the charged property has been sold to the purchaser under the authority of the NLC to enable him to present the issue document of title to the Registrar of Titles for registration under s. 267.

[2] In this country, cases of a litigant suing the solicitor acting for his adversary are unknown and if indeed such cases exists, they are far and few that none seems to have made their way into the law reports. Whether or not the same public policy of shutting off such litigations should apply here, as it does in England, is a matter which should not be decided summarily at the interlocutory stage where the scope of enquiry is to be limited strictly, only to determine whether the plaintiff's claim discloses any reasonable cause of action. This question should properly be left to be decided in a full trial where the morality of the issue could be ventilated by the parties.

[3] Section 14(2) of the Court of Judicature Act 1964, affords protection only to officers of the Court or any such person (which may well include solicitors who are bound to execute the orders of the Court as in the instant case) only in respect of the act of executing the order as opposed to the manner of its execution. It would not afford protection where for instance, the execution of the order is carried out negligently as alleged in the instant case. The purpose of this subsection, it would appear, is to give the clout and authority to persons carrying out the lawful order of the Court.

[4] The rationale behind O. 15 r. 4(2) of the Rules of the High Court 1980 is to bring all parties whose interests may be affected by an action to a common forum so as to avoid multiplicity of claims that may arise later from any party that may have been left out. It is strictly a rule of convenience and has nothing to do with causes of actions. Order 15 r. 6(1) RHC provides a complete answer to this issue in that the nonjoinder of the 9th co-proprietor in the present suit cannot be a ground to dismiss the claim of the other plaintiffs.

[5] The plaintiffs' claim against the defendants is founded on the "defendants' failure and wilful neglect to carry out the sale of the said property under the conditions of sale as ordered by the Court" thereby causing the plaintiffs to suffer financial loss. This Court cannot find within the four

corners of the plaintiffs' pleading any absence of a cause of action to allow this application.

[Plaintiffs' appeal allowed. Defendants' application to strike out dismissed with costs]

Cases referred to:

Seloga Jaya Sdn. Bhd. v. Pembinaan Keng Ting (Sabah) Sdn. Bhd. [1994] 2 MLJ 97 ***(refd)***

M & J Frozen Food Sdn. Bhd. & Anor. v. Siland Sendirian Berhad & Anor. [1994] 2 CLJ 14

Al-Kandari v. J.R. Brown & Co. [1988] All ER 675 ***(refd)***

*Ho Kok Thin & Ors. v. The Sheriff/Registrar of the High Court Borneo & Anor. [1989] 3 MLJ 181****(dist)***

Zakaria bin Mohamed Esa v. Dato' Abdul Aziz bin Ahmad and Ors. [1985] 1 MLJ 222 ***(refd)***

Loh Holdings Sdn. Bhd. v. Peglin Development Sdn. Bhd. [1984] 2 MLJ 105 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 14(2)

National Land Code 1965, ss. 254, 256, 259(3)(a), 267

Rules of the High Court 1980, O. 18 r. 19, O. 15 rr. 4(2), 6(1)

For the plaintiffs - Lim Boon Seng; (S.A. Lingam with him); M/s. Lim Boon Seng & Co.

For the 1st & 2nd defendants - Paul Subramaniam; M/s. Maxwell, Kenion, Cowdy & Jones

JUDGMENT

Kang Hwee Gee J:

This is an appeal from the decision of the Deputy Registrar allowing the defendants' application to strike out the plaintiff's claim under O. 18 r. 19 of the Rules of the High Court 1980 on grounds that it disclosed no reasonable cause of action.

The plaintiffs in this case were at one time the registered proprietors of three pieces of land *viz.* Geran No. 6543 Lot 10550, Geran No. 7616 Lot No. 968 Mukim Ulu Kinta and Geran 19511 Lot 35117 Bandar Ipoh ("the property") which were charged to the 1st defendant bank to secure an overdraft facility for a company called Thong Woh Sawmill & Timber Merchant Sdn Bhd.

On 24 July 1987, an order of sale of the property was made by the High Court pursuant to an action under s. 254 of the National Land Code 1965 ("the NLC") which was commenced through the 2nd defendant as solicitors and advocates of the 1st defendant to recover the sum of RM694,169.18 due to the 1st defendant on the charge together with interest of 10.75% per annum to run from the date of the order.

Subsequently, by an order made by the Senior Assistant Registrar on 4 April 1988 the property was put up for sale by public auction with the reserve price of RM1,020,000 and subject to the terms and conditions of sale and approved by him.

At the public auction held on 25 March 1989 the said property was sold to one Tan Kin Tong @ Tan Kean Hoe as nominee of Tan Khor Seng & Sons Enterprises Sdn Bhd for the sum of RM1,020,000.

In their statement of claim the plaintiffs alleged that under the order made by the Senior Assistant Registrar the conduct of the sale was placed in the hands of the 2nd defendant. In breach of conditions of sale the 2nd defendant:

(i) collected the 10% deposit from purchaser only on 28 March 1989 and not on the fall of the hammer,

(ii) allowed the purchasers two extensions of time to pay balance of part of the purchase price after due date without knowledge and consent of plaintiff and,

(iii) collected a total sum of RM826,580.59 out of the sale price of RM1,020,000 from the purchaser through his solicitor Ngan & Tan leaving a balance of RM157,519.14 uncollected and transferring and delivering possession of the property to the purchaser despite the balance.

By reason of the defendants' wilful neglect and failure to carry out the sale of the property under the conditions of sale as ordered by the Court the plaintiff claimed that they suffered financial loss as particularised in their statement the sum of RM386,631.80, interest and costs.

In their joint statement of defence the defendants denied they were liable for any damages sought by the plaintiff. While admitting that the 2nd defendant had conduct of the sale, the defendants aver that it was conducted together with the bailiff of the Court and a licensed auctioneer appointed by the Court and in conducting the said auction all the three parties were acting as officers of the Court. In essence the following averments are pleaded:

(i) the extensions of time to complete the sale were granted by the Senior Assistant Registrar upon the requests of the purchasers in accordance with the prevailing practice of the Court,

(ii) the balance of purchase price of RM157,519.41 which the plaintiffs alleged the defendants failed to account for had been applied in accordance with the NLC to settle arrears of quit rent and assessment owed on the property of RM170,742.16 at the time of the sale which the plaintiff failed to pay and,

(iii) the 2nd defendant was merely acting as an advocate and solicitor of 1st defendant in the conduct of the sale.

An appeal from the Registrar to the Judge-in-Chambers is to be treated as an actual rehearing of the application as though it came before him for the first time. (*Seloga Jaya Sdn. Bhd. v. Pembinaan Keng Ting (Sabah) Sdn. Bhd.* [1994] 2 MLJ 97). In this appeal therefore, I will only consider the points raised by the parties before me and ignore all that may have been raised before the Registrar.

In the hearings before me Counsel for the defendants raised the following points in support of his contention that the plaintiffs' statement of claim discloses no reasonable cause of action and ought to be struck out:

1. Pursuant to the sale, a certificate in Form 16F of the NLC had been issued to the purchaser. No application was made by the plaintiff to set aside or rectify the sale. The said certificate is conclusive that the sale had been properly carried out. Only if the sale is set aside will the question of the defendants' liability arise.

2. The 2nd defendant as solicitors for the 1st defendant cannot be sued by the opposing party.

3. The auction sale was conducted by the Court. The 2nd defendant together with the auctioneer and the bailiff were merely acting as officers of the Court. As officers of the Court they were immuned from liability under s. 14(2) of the Courts of Judicature Act 1964.

4. In a separate interlocutory hearing (enclosure 21 dated 25 March 1994) the Court had allowed the 9th plaintiff to be struck out in this suit on ground that he had not obtained letter of administration to represent the deceased person Wong Cheong Kam the 9th co-proprietor of the property. As the claim involves the joint interest of all the nine co-proprietors the action cannot proceed without the 9th co-proprietor being joined as a plaintiff.

I will begin with the first ground by citing the *ratio* in *M & J Frozen Food Sdn Bhd & Anor. v. Siland Sendirian Berhad & Anor.* [1994] 1 AMR 4: 137 which was referred to by Counsel for both parties, and which in my view will have a direct bearing in this appeal.

In *M & J Frozen Food* a successful bidder in a public auction in a judicial sale under s. 256 of the NLC failed to pay the balance of the purchase price within 30 days of the date of auction as required under the terms and conditions of sale as set by the Court. He applied for and obtained an extension for completion of the purchase from the Senior Assistant Registrar some four months after the due date. Notwithstanding that the order of the Registrar approving the extension was set aside by the Judge two days later on the intervention of the chargor, the Registrar proceeded to issue the Form 16F certificate of sale under s. 259(3)(a) of the NLC. Subsequently, the certificate

of sale issued by the Registrar was annulled and the registration of transfer of the property to the purchaser was cancelled by the Judge who also ordered that the issue document of title be returned and the property be resold.

On appeal by the purchaser to the Supreme Court, it was held *interalia*, that a chargor's proprietary right under the NLC is not entirely extinguished at the fall of the auctioneer's hammer. He may intervene to set aside the sale in the event of fraud, impropriety or the breach of any statutory or contractual terms of the sale. While the terms and conditions of sale may be varied by the Court (as in the present case by extending the date of completion of purchase) if having regard to the interest of both the chargor and chargee it is fair to do so, this has to be done only after giving the chargor the right to be heard. This is so because the Court's power to order sale including fixing the price and condition of sale is derived from the statutory provisions of the NLC which provided such right to the chargor and any alteration to the term and condition, it was held must likewise comply with these provisions. The purchaser's appeal was disallowed.

It seems clear to me that based on *M & J Frozen Food* the *ratio* of which could be applied to the instant case, there could be no basis whatsoever to hold that the plaintiffs' statement of claim discloses no reasonable cause of action. But Counsel for the defendants did not rely on that case for that aspect of the ruling which defined a purchaser's right in a judicial sale under s. 256 of the NLC where the completion of purchase is varied without the notice of the chargor, which was clearly not in his clients' favour. Instead, he sought to distinguish *M & J Frozen Food* on the facts - that in that case the certificate of sale had been set aside which is not so in the present case. The certificate he contended, was conclusive of the fact that the sale was properly carried out and until it is set aside or annulled, the plaintiffs have no cause of action.

With respect I am unable to agree. It is clear to me that a Form 16F certificate issued under s. 259(3)(a) of the NLC by its very content says no more than the fact that the charged property has been sold to the purchaser under the authority of the NLC to enable him to present the issue document of title to the Registrar of Titles for registration under s 267.

The second ground raised by Counsel merits a closer examination. In submitting that as solicitors for the 1st defendant, the 2nd defendant cannot be sued by the plaintiffs, Counsel relied on the following passage from the judgment of Bingham LJ in *Al-Kandari v. JR Brown & Co.* [1988] All ER 675:

> In the ordinary course of adversarial litigation a solicitor does not owe a duty of care to his client's adversary. The theory underlying such litigation is that justice is best done if each party, separately and independently advised, attempts within the limits of the law and propriety and good practice to achieve the best result for himself that he reasonably can without regard to the interests of the

> other party. The duty of the solicitor, within the same limits, is to assist his client in that endeavour, although the wise solicitor may often advise that the best result will involve an element of compromise or give and take or horse trading. Ordinarily, however, in a contested civil litigation a solicitor's proper concern is to do what is best for his client without regard to the interests of his opponent.

In its barest form the facts in *Al-Kandari* were as follows. An action for the tort of negligence was brought by a wife against the solicitors of the husband in negligence for their failure to ensure that the husband's passport which also carried the names of the couple's two children from being retrieved by the husband from the Kuwaiti Embassy. The passport was being retained by the Embassy pending an application to have the names of the children removed from the husband's passport. The husband's solicitors had earlier undertaken to hold the husband's passport in a custody proceeding which was settled by consent where custody of the children was given to the wife. The retrieval of the passport enabled the husband to kidnap the children back to Kuwait away from the wife.

The Court of Appeal held that although public policy generally required that a solicitor should be protected from claims in negligence by his client's opponent, by voluntarily agreeing to hold the passport to the order of the Court the solicitor had acted beyond his duty as solicitor for his client and was therefore liable in negligence.

Al-Kandari, it is clear to me did not rule that a plaintiff has no cause of action against his opponent's solicitor but that public policy would disallow such an action. In this country, cases of a litigant suing the solicitor acting for his adversary are unknown and if indeed such cases exist, they are far and few that none seems to have made their way into the law reports. Whether or not the same public policy of shutting off such litigations should apply here, as it does in England, is a matter which should not be decided summarily at the interlocutory stage where the scope of enquiry is to be limited strictly, only to determine whether the plaintiffs' claim discloses any reasonable cause of action. This question should properly be left to be decided in a full trial where the morality of the issue could be ventilated by the parties.

I will now deal with the third ground raised by defendants' Counsel, that a solicitor having conduct of an auction sale ordered by the Court is an officer of the Court within the meaning of s. 14(2) of the Courts of Judicature Act 1964 and is immune from being sued. Section 14(2) reads as follows:

> No officer of any Court or other person bound to executing the lawful warrants or orders of any Judge or other person acting judicially shall be liable to be sued in any civil Court for the execution of any order which he is bound to execute if within the jurisdiction of the person issuing the same.

The case of *Ho Kok Thin & Ors. v. The Sheriff/Registrar of the High Court Borneo & Anor.* [1989] 3 MLJ 181 was referred to by Counsel in his submission on this point. In that case the Registrar of the High Court Borneo aborted an auction sale of a property to the prejudice of the purchaser who had successfully bid for it. It was held (Haidar J) that there was no reasonable because of action against the Registrar as he "can properly claim the protection of s. 14(2) of the Courts of Judicature Act 1964."

Before I consider Counsel's submission, I propose first to consider the purport of this subsection. From its plain language, it is clear to me that the subsection affords protection only to officers of the Court or any such person (which may well include solicitors who are bound to execute the orders of the Court as in the instant case) only in respect of the act of executing the order as opposed to the manner of its execution. It would not afford protection where for instance, the execution of the order is carried out negligently as alleged in the instant case. The purpose of this subsection, it would appear, is to give the clout and authority to persons carrying out the lawful order of the Court.

It follows therefore, in so far as this subsection is relied upon to support the view that solicitors are protected against the negligence in the conduct of the sale, I will have to rule that it does not do so. I am aware that his Lordship Haidar J in *Ho Kok Thin & Ors.* did not appear to distinguish between the mere execution of an order of the Court and the manner of its execution in deciding that the Registrar of the High Court Borneo as an officer of the Court was protected under the subsection for aborting an auction sale. To the extent that the ruling could be interpreted as applying to both the act as well as the manner of execution, I must with respect state here that I do not subscribe to this view.

I will now consider the last point raised by the defendants that the present eight joint plaintiffs do not have the *locus standi* to continue to maintain this action.

As co-proprietors of the property, according to Counsel for the defendants, all their interest in the property is joint and not several. They must, he submitted, comply with O. 15 r. 4(2) of the Rules of the High Court 1980 which reads as follows:

> Where a plaintiff in any action claims any relief to which any other person is entitled jointly with him, all persons so entitled must subject to the provisions of any written law, and unless the Court gives leave to the contrary, be parties to the action and any of them who does not consent to being joined as a plaintiff must, subject to any order made by the Court on an application for leave under this paragraph, be made a defendant.

Basically, the rationale behind this rule is to bring all parties whose interests may be affected by an action to a common forum so as to avoid multiplicity of claims that may arise later from any party that may have been left out. It

is therefore strictly a rule of convenience and has nothing to do with cause of action. Hence the subsequent O. 15 r. 6(1), which unfortunately, was not referred to by the parties in their submissions, provides that:

> No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party; and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights or interests of the persons who are parties to the cause or matter.

The above provision needs no elaboration and provides a complete answer to the last issue raised by the defendants - the nonjoinder of the 9th co-proprietor in the present suit cannot be ground to dismiss the claim of the other plaintiffs.

It is trite law that in an application to strike out a pleading under O. 18 r. 19 where the only ground is that it discloses no reasonable cause of action as in the present case, the Court is bound to confine its enquiry within the four corners of the pleading sought to be impeached. All allegations in the pleading would have to be assumed for the time being, to be true and the Court is not concerned at this stage of the proceeding whether those allegations are unfounded (see *Zakaria bin Mohamed Esa v. Dato Abdul Aziz bin Ahmad and Ors*. [1985] 1 MLJ 222). Further, as long as the statement of claim discloses some ground of action, the mere fact that the plaintiff is unlikely to succeed at the trial is no ground for striking it out (see Federal Court case of *Loh Holdings Sdn. Bhd. v. Peglin Development Sdn. Bhd.* [1984] 2 MLJ 105).

It is clear to me from para. 18 of the statement of claim that the plaintiffs' claim against the defendants is founded on the "defendants' failure and wilful neglect to carry out the sale of the said property under the conditions of sale as ordered by the Court" thereby causing the plaintiffs to suffer financial loss. I could not find within the four corners of the plaintiff's pleading any absence of a cause of action to allow this application.

The plaintiff's appeal is allowed. The defendants' application is dismissed with costs.

Reported by Cindy Chan